Supreme Court, U.S.
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No. 02-437

IN THE

Supreme Court of the United States

MARIE N. JACKSON,

Petitioner,

v.

CHUBB & SON, INC., a division of FEDERAL INSURANCE COMPANY; PAT HURLEY; MICHAEL MARINARO; GEORGE FAY; DORIS JOHNSON; MALCOLM BURTON; JEFF KING; KIM HOGREFE; BRIAN KRISTIANSEN; SUSAN GAFFNEY; ED ELLIS; JIM GARDNER; JOHN DEGNAN; ED SPELL; SYLVESTER GREEN; and AARON GOLDSTEIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should grant certiorari as to the following questions, which primarily involve the application of settled state law to idiosyncratic facts:

(a) Did the courts below properly apply clear New Jersey state precedent in dismissing Petitioner's claims as time barred and in determining that Petitioner's discrete failure to transfer and promote claims were not subject to the continuing violation doctrine?

(b) Did the courts below properly grant summary judgment in favor of Respondents, after viewing the underlying facts and drawing all reasonable inferences in favor of Petitioner on the element of pretext, including Petitioner's allegation that her employer failed to investigate her discrimination claims, and concluding that Petitioner did not come forward with sufficient evidence to establish pretext?

LIST OF PARTIES TO THE PROCEEDING

Respondents agree with Petitioner's identification of parties to the proceeding, except as to Ron Goldstein and Aaron Goldstein, who in fact are the same person.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Chubb & Son, Inc., a division of Federal Insurance Company, is wholly owned by The Chubb Corporation, which is publicly traded.

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OPINIONS BELOW

The Court of Appeals' unreported decision, with all footnotes (which were not included in Petitioner's Appendix), is set forth in the Appendix at App. 1a through 6a.

STATEMENT OF THE CASE[1]

The Petition for a Writ of Certiorari filed by Marie Jackson ("Petitioner") in this case concerns an employment discrimination case, which was dismissed in its entirety by the United States District Court for the District of New Jersey, as affirmed by the United States Court of Appeals for the Third Circuit. Pet. App. 63a & 65a. Petitioner presents not one reason for the Supreme Court to consider this case. The decisions below are premised on idiosyncratic facts and settled law, and are completely consistent with the rulings of United States Courts of Appeal. There are no important federal questions or unsettled legal theories that would, if resolved, affect other future litigants. In short, there exists no compelling reason to warrant review of this matter. Petitioner's contention herein that the factual findings below were erroneous and the courts misapplied the law is not enough for this Petition to be granted.

Petitioner began her employment with Respondent Chubb & Son, Inc. ("Chubb") in February 1989 as a Home Office Examiner in Warren, New Jersey. Pet. App. 1a & 27a. She joined Chubb with five years' experience as an associate with a New Jersey law firm. *See* Pet. App. 27a. As a Home

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1. The relevant facts and procedural history of this matter are also cogently set forth in the opinions below. *See* Pet. 2a-6a, 24a-34a.

Office Examiner, Petitioner primarily dealt with claims under Chubb's Directors and Officers insurance policy ("D&O" claims). *Id.* She was responsible for providing technical assistance to the D&O Examiners working for Chubb throughout the country in "zone" offices. Petitioner, like other Home Office Examiners, would monitor or "shadow" zonal claims files. Pet. App. 28a.

In November 1994, as the result of a reorganization of Chubb's D&O Claims Department, all of the Home Office Examiners who had worked in Warren, New Jersey, including Petitioner, were deployed to the various zones. In December 1994, Petitioner was offered and accepted a position in the New York Zone in New York City, where she reported to Ed Ellis, Manager of the New York office. Pet. 3a. Petitioner's pay grade and her reserve and settlement authority remained the same. The fundamental change in her responsibilities was that, rather than merely monitoring D&O claims handled by the zonal D&O Examiners, Petitioner now assumed direct responsibility for the claims. Pet. App. 29a.

Following Petitioner's transfer to New York in December 1994, Ellis was responsible for conducting Petitioner's Performance Review for 1994. Petitioner received an overall rating of "Met Most"[2] for 1994. Although the Performance Review reflected that response time standards had generally been met, it noted that Petitioner's response time was inadequate in some instances. The review also noted that Petitioner needed to better prioritize workflow and take a more proactive approach to her files. In addition to the Performance Review, Ellis completed

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2. Chubb's appraisal system included six (6) descriptive ratings: "Exceeded All," "Exceeded Some," "Met All," "Met Most," "Met Some," and "Did Not Meet" goals. Pet. App. 29a.

Petitioner's Performance Plan for the coming year. This Plan identified Petitioner's Customer Service Goals, which were also the standard goals for all D&O Examiners. *See* Pet. App. 29a-30a.

Approximately one year later, in or about February 1996, Ellis completed Petitioner's annual review for 1995. Again, Petitioner received an overall rating of "Met Most," although in some areas she received a "Met Some" rating. The most serious concern which Ellis expressed to Petitioner was that she was not consistently setting reserves within the 90-day time frame required by Chubb's Audit Guidelines.[3] Soon after Ellis met with Petitioner to discuss the Performance Review, she incurred an inordinate number of 90-day reserve violations. This caused Susan Gaffney, the Regional Claims Manager and Ellis' supervisor, to instruct Ellis to review Petitioner's files. *See* Pet. App. 31a.

Following his review of Petitioner's files, Ellis set forth his findings in a memorandum to Petitioner. The memorandum documented that reserves were overdue on various files and, thus, once set, would incur 90-day violations. Ellis also noted that Petitioner had already incurred numerous reserve violations with respect to the cases on her file inventory. Pet. App. 31a-32a.

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3. All Examiners were required to comply with Chubb's Audit Guidelines, which ensured appropriate claim management and service excellence. For example, each Examiner was responsible for the preparation of a detailed D&O Memo within ninety (90) days of receipt of the claim, and was expected to set expense and loss reserves in a timely manner. The Guidelines were reflected in the performance goals of the Examiners and thus were among the criteria on which each Examiner was evaluated. *See* Pet. App. 28a.

In the subsequent weeks, Ellis continued to urge Petitioner to bring her files into compliance with Chubb's Audit Guidelines. Additionally, because the performance issues were serious, Ellis requested that a Human Resources representative be present at a meeting scheduled for July 19, 1996. At the meeting, Ellis reviewed the file for each claim he identified in his memorandum and confirmed that the files were deficient in the manner he had reported. *See* Pet. App. 32a. This review also demonstrated that Petitioner had not corrected the majority of the identified problems.

In the Fall of 1996, Susan Gaffney assumed direct responsibility for the supervision of Petitioner. Pet. App. 3a & 32a. In the fall of 1996, Gaffney presented Petitioner with the option of transferring to a position in the Eastern Zone office in New Jersey. Petitioner advised Gaffney that she would accept the transfer and would commence work in New Jersey on December 2, 1996. Pet. App. 33a. After Petitioner transferred to New Jersey, Gaffney discovered that Petitioner had failed, in several instances, to adhere to Chubb's Audit Guidelines with regard to the issuance of coverage letters. Gaffney discussed the matter with Petitioner and memorialized her discussion in a memorandum, in which she identified the cases in question, provided substantive guidance, and advised Petitioner that her failure to issue coverage letters in a timely manner was a cause for serious concern. *See id.*

On February 19, 1997, Petitioner submitted a memorandum to Gaffney entitled "self-review," for Gaffney to consider in completing Petitioner's annual performance review. In this memorandum, Petitioner alleged, among other

things, that she was being discriminated against, that she had been saddled with an unreasonable workload, and that, in her view, she was entitled to an "Exceeds All" performance evaluation (an extraordinary evaluation at Chubb even under the best of circumstances). *See id.* On February 28, 1997, Gaffney provided a response to Petitioner's allegations and advised that, in her opinion, Petitioner had been performing at a "Met Some" level.

On March 6, 1997, Gaffney presented Petitioner with her Review for 1996, along with an "Initial Warning." Petitioner received a performance rating of 1.5 out of a possible 5 points — the equivalent of a "Met Some." Gaffney advised Petitioner that, consistent with company policy, the Initial Warning would remain in place for 45 days, and her performance would be reassessed at that time. *See id.*

Gaffney met with Petitioner to review her performance on April 4, 1997, before the expiration of the 45-day period. Gaffney advised Petitioner that she had reviewed 56 (more than half) of her files and that she found many deficiencies. *See id.* Again, Petitioner was given the opportunity to improve her performance.

On May 1, 1997, Gaffney met with Petitioner. As there had been no noticeable improvement in Petitioner's performance, Gaffney issued a "Written Warning." Gaffney informed Petitioner that her performance needed to improve to a consistently acceptable level before June 13, 1997. After Gaffney issued the Written Warning, she received an unsolicited message from Chubb's Home Office, advising that Petitioner had mismanaged a claim. *See* Pet. App. 34a.

The foregoing incident, together with Petitioner's overall file handling, led Gaffney to conclude not only that Petitioner's performance had not improved, but that Petitioner was not acknowledging her performance issues. *Id.* Further review of Petitioner's files by Gaffney confirmed that there had been no appreciable improvement in Petitioner's performance since her receipt of the final Written Warning. Consequently, on June 20, 1997, Gaffney advised Petitioner that her employment would be terminated. *Id.* Petitioner's race, age and gender played absolutely no part in the decision to terminate her employment, nor did her prior complaints of discrimination.

On September 15, 1998, Petitioner filed this action against Chubb Corporation, Chubb & Son, Inc., a division of Federal Insurance Company, and 15 current and former employees alleging race, gender and age discrimination during the period of her employment. Thereafter, Petitioner filed four amended complaints. Pet. App. 3a. For purposes of this Petition, only the Third Amended Complaint ("Complaint") is at issue. Pet. App. 5a.

Chubb and the 15 individually named current and former employees (collectively, "Respondents") moved to dismiss certain of Petitioner's failure to promote claims and her discriminatory transfer claim on statute of limitations grounds. Pet. App. 2a. On September 5, 2000, the District Court granted Respondents' motion in part, finding that Petitioner's failure to promote and transfer claims under the Age Discrimination and Employment Act and Title VII were time-barred for failure to meet EEOC time requirements, and her claims under Section 1981 and the New Jersey Law Against Discrimination were limited to a two-year statute of limitations. Pet. App. 2a & 25a. Petitioner thereafter had only

the following distinct claims intact: (1) the June 1996 promotion of Mary Elliott; (2) the December 1996 promotion of Aaron Goldstein; (3) the February 1997 promotion of James Sharkey; and (4) Petitioner's June 20, 1997 termination. *See* Pet. App. 19a-20a & 26a.

On December 12, 2000, in contravention of the time limitations contained in New Jersey District Court Local Civil Rule 7.1(g), Petitioner urged the District Court to reverse its prior decision as to her New Jersey state law claims based upon the New Jersey Supreme Court's decision in *Ali v. Rutgers*, 166 N.J. 280, 765 A.2d 714 (2000). *See* Pet. App. 26a-27a. On March 21, 2001, the District Court denied Petitioner's motion for reconsideration. The court also granted Respondents' summary judgment motion seeking dismissal of the balance of Petitioner's claims. Pet. App. 59a. The court found that, notwithstanding the voluminous discovery she had received, Petitioner failed to present evidence sufficient to create a genuine issue of material fact. *See* Pet. App. 46a.

Petitioner filed a Notice of Appeal on April 19, 2001. On June 7, 2002, the Court of Appeals entered its Opinion and Order, affirming the District Court decision in its entirety. *See* Pet. App. 62a-63a. The United States Court of Appeals for the Third Circuit held: "[a]fter careful consideration, we conclude that Jackson's claims are wholly unavailing and we will affirm the District Court." Pet. App. 63a.

REASONS FOR DENYING THE PETITION

Rule 10 of the Supreme Court Rules, entitled "Considerations Governing Review on Certiorari," provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

> findings or the misapplication of a properly stated rule of law.

(Emphasis added).

This Petition fails to meet any of these prerequisites for certiorari jurisdiction. Rather, Petitioner maintains that certiorari should be granted as the "District Court improperly applied New Jersey State law and incorrectly held that under the New Jersey Supreme Court case of *Ali v. Rutgers*, 166 N.J. 280, 765 A.2d 714 (2000), the statute of limitation should be two years, rather than six years," for Petitioner's state law discrimination claims. Pet. 6. She further argues that the District Court erroneously found that the "continuing violation" theory was inapplicable, and moreover that Petitioner could not prove a "continuing violation" as to her claims. Pet. 6. Finally, Petitioner asserts that she presented "ample evidence," in particular with regard to pretext, such that summary judgment should not have been granted to Respondents. Pet. 6-7.

Petitioner has not pointed to a conflict within the federal circuit courts of appeal. She has not identified any federal question decided by the courts below that conflicts with a decision of the New Jersey Supreme Court or any other court. She has certainly not set out any facts to support a finding that the courts below departed from the accepted and usual course of judicial proceeding. Petitioner simply does not like the result she obtained and so inappropriately seeks to invoke the jurisdiction of this court.

The District Court applied the correct rule of law and reached the only possible conclusions based upon the voluminous factual record presented in this case. Thus, the United States Court of Appeals for the Third Circuit properly affirmed the District Court and there is no reason for review by this Court.

A. The Appropriate Statute Of Limitations And Interpretation Of the Doctrine of "Continuing Violation" Under New Jersey State Law Are Not Appropriate For Certiorari

Petitioner's first point merely challenges the application of the New Jersey state statute of limitations to the facts. It is well-settled that this Court does not grant certiorari to review state law questions, except perhaps under truly extraordinary circumstances. *See, e.g., Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Brockett v. Seattle Arcade, Inc.*, 472 U.S. 491, 500 (1985); *Bishop v. Wood*, 426 U.S. 341, 345-46 & n.10 (1976); *see generally* Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* 134-35, 242-43 (8th ed. 2002). Additionally, certiorari should not be granted for questions in which a petitioner asserts error based on "erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10; *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In particular, where, as here, a court of appeals has concurred with the finding of fact by the lower court, a court of law, such as this Court is, "rather than a court for correction of errors in fact finding, . . . cannot undertake to review concurrent findings of fact by two courts below, in absence of very obvious and exceptional showing of error." *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (citations omitted). Finally, certiorari is inappropriate for cases that do not involve matters of far-reaching import; thus, issues of interest and importance to only the particular parties in a case are not worthy of review. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

No party has disputed the statement of the principles of New Jersey law by the courts below. Rather, Petitioner asks this Court to rule whether she presented "operative facts" relevant to her discrete failure to promote and transfer claims, which arose prior to 1993, thereby invoking a longer six-year statute of limitations under the New Jersey state discrimination statute. Pet. 6-9. Specifically, Petitioner asserts that the facts giving rise to her discrimination claims — the alleged "operative facts" in this case — actually began in 1989. Pet. 8-9. The Court of Appeals properly affirmed the District Court's holdings that "all of the 'operative facts arose in and after 1994 and, therefore, the two-year statute of limitations applies' to Jackson's dismissed claims." Pet. App. 64a. This fact-based decision is not worthy of review.

In addition, Petitioner argues that she was entitled to prove, and did prove, a "continuing violation" under New Jersey state law, thereby requiring an extension of the statute of limitations. Pet. 6. Again, the District Court specifically held, consistent with settled New Jersey state law, that "[b]ecause Jackson's claims arose from discrete employment actions . . . and . . . it is clear . . . she believed that she was being discriminated against at the time of these actions, we find that the continuing violation theory does not apply here." Pet. App. 64a. Especially where, as here, the underlying legal principles are undisputed, it is beyond the duty of the Supreme Court to stand as a third-level court of corrections. *Graver*, 336 U.S. at 275.

Clearly, Petitioner's alleged New Jersey state law issues do not rise to the level of importance required for review by the Court. The statute of limitations and "continuing violation" questions raised by Petitioner do not have far reaching implications as they revolve, exclusively, around the facts specific to Petitioner's allegations. Review of the

decisions below would not alter or clarify any principle of law applicable to anyone other than these litigants.

Thus, it is clear that a writ should not be granted for review of Petitioner's questions arising under the New Jersey state discrimination statute.

B. The Assessment Of Pretext Evidence Is Not Appropriate For Certiorari

Despite the fact that the Court has specifically stated that it does not "grant a certiorari to review evidence and discuss specific facts," *Johnston*, 268 U.S. at 227, Petitioner again seeks a review of factual findings as to the adequacy of her alleged pretext evidence. Petitioner's Petition for a Writ as to her alleged pretext evidence must not be granted for reasons similar to those precluding her state law discrimination claims from review: (a) she asserts error based on "erroneous factual findings or the misapplication of a properly stated rule of law," *see* Rule 10; (b) she asks the Court to act as "a court for correction of errors in fact finding . . . to review concurrent findings of fact by two courts below," s*ee Graver*, 336 U.S. at 275 (citations omitted); and (c) she fails to raise issues of far-reaching import but, rather, only questions of interest and importance to the parties in this matter, s*ee Layne*, 261 U.S. at 393; *Rice*, 349 U.S. at 79.

In framing her issues, Petitioner herself reveals the inappropriate nature of her Petition. Petitioner states: "[Petitioner] presented ample evidence demonstrating material factual issues, . . . thereby precluding summary judgment." Pet. 6-7. The nine pages of facts allegedly supporting Petitioner's claims of pretext, Pet. 21-30, clearly reveal the unique factual nature of this Petition for a Writ. Although Petitioner fleetingly alleges that the courts below misapplied *Reeves v. Sanderson Plumbing Prod., Inc.*,

530 U.S. 133 (2000), *see* Pet. 6-7, any such asserted error — a mere "misapplication of a properly stated rule of law" — is not among those matters for which this Court grants certiorari. *See* Rule 10. Petitioner's questions presented as to pretext need not, and should not, be decided by the Supreme Court.

C. The District Court, as Affirmed by the Court of Appeals, Correctly Decided the Issues Raised by Petitioner

Certiorari review in this case is not warranted because the decisions by the courts below were correct. As the District Court fully considered and correctly decided the issues presented by Petitioner, and as the Court of Appeals conducted a full review of Petitioner's claims, and by a unanimous panel decision affirmed the District Court, there is no reason for this Court to reconsider Petitioner's claims for a third time.

1. A Two-Year Statute of Limitations Has Been Correctly Applied to Petitioner's State Law Claims

The District Court, as affirmed by the Court of Appeals, applied a two-year, rather than six-year, statute of limitations to Petitioner's claims under the New Jersey state discrimination statute, finding that there were no "operative facts" that occurred prior to July 1993. Pet. App. 15a & 64a. Petitioner's challenge to those decisions is entirely without merit.

In *Montells v. Haynes*, 133 N.J. 282, 627 A.2d 65 (1993), the New Jersey Supreme Court held that a two-year statute

of limitations applies to all state discrimination claims in which the operative facts arose after July 27, 1993, the date of the opinion. 133 N.J. at 298; 627 A.2d. at 662. The *Montells* decision left open the question of whether a two-year or six-year statute of limitations applied to cases in which the operative facts arose *both* before and after the *Montells* decision. In a prescient decision, after reviewing *Montells* and the record in this case, the District Court wrote that "the operative facts arose in and after 1994 and, therefore, the two-year statute of limitations applies to [Jackson's state discrimination law] claims." Pet. 14a. The New Jersey Supreme Court's subsequent decision in *Ali v. Rutgers*, 166 N.J. 280, 765 A.2d 714 (2000), only confirmed that the District Court's conclusion was entirely appropriate.

In an untimely motion for reargument before the District Court and again on appeal to the Court of Appeals, Petitioner urged the court to apply the *Ali* decision, which held that a six-year statute of limitation would apply to claims with operative facts occurring prior to and after *Montells*. *See* Pet. App. 34a & 36a-37a. The District Court, reconsidering its earlier decision in light of the newly decided *Ali*, reaffirmed its prior conclusion. *See* Pet. App. 38a. It found the *Ali* decision inapplicable to Petitioner's state law claims, noting that "there are no such 'operative facts' alleged here occurring pre-*Montells* that would bring this case under the rule announced" in *Ali*. Pet. App. 36a. After reviewing *Ali*, the Court of Appeals affirmed this decision, concluding that the appropriate statute of limitations had been applied to Petitioner's state law claims. Pet. App. 64a.

Petitioner now argues that the Court of Appeals and the District Court misapplied the law to the factual evidence in this case. Specifically, Petitioner makes vague, unsupported

references to "disparate treatment in the early 1990s" by a former supervisor, jokes allegedly told "before 1994," a supervisor's alleged discrimination against others "before 1994," and suits allegedly filed by others "in the mid-1990s" for discrimination. Pet. 21. Petitioner herself characterizes these "facts" as "backdrop evidence." Pet. 9. Petitioner's four Amended Complaints, however, reveal only discrete claims of failure to promote and wrongful discharge.[4]

But even if her Complaint could somehow be construed to include these alleged "backdrop" facts, Petitioner has utterly failed to demonstrate how these "facts" are "operative" with respect to her failure to promote claims occurring in November 1994 and after. Notably, Petitioner misstates the law when she argues that "the six-year statute of limitations applies whether [sic] *any facts* arose before the *Montells* decision." Pet. 9. The holding in *Ali* is clearly to the contrary, requiring that relevant "*operative*" facts occur pre-*Montells*.[5] *See* Pet. App. 36a.

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4. Moreover, Jackson's alleged pre-1993 "operative facts" were only presented to the courts below for the first time in opposition to Chubb's *motion for summary judgment* on the claims remaining after Chubb's successful motion to dismiss on the basis of the LAD statute of limitations. The facts and arguments not presented to the District Court at the time of Chubb's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) were therefore inappropriate for consideration on reconsideration or appeal.

5. As the District Court noted in its decision on Jackson's motion for reconsideration, the only paragraph of Jackson's Complaint that contains pre-*Montells* allegations is paragraph 43. The Court found that Jackson does not allege a cause of action based upon the statements contained in this paragraph, offering them instead as "backdrop" evidence, and that these allegations are not relevant to the causes of action she does allege. Pet. App. 37a. Jackson does not take issue with the Court's determination.

As the District Court and the Court of Appeals properly determined, "Petitioner's claims arose from discrete employment actions," the operative facts of which unquestionably occurred in and after 1994. Resp. App. 4a and n.4. Thus, the courts below properly found that a two-year statute of limitations applies.

2. The Continuing Violation Theory Does Not Apply to Petitioner's Discrete Failure to Promote and Transfer Claims

Despite the fact that she asserts discrete acts as the basis for her claim, and the fact that the "continuing violation" theory was rejected multiple times below, Petitioner continues to contend before this Court that she was subjected to a "pattern of discrimination and retaliation" and, as such, the statute of limitations did not begin to run on any of her claims until the last act of discrimination occurred. Pet. 8, 12 & 16. The law is directly contrary to her position. New Jersey and federal courts have routinely determined that discrete events are not susceptible to a continuing violation analysis. Thus, the District Court's decision, as affirmed by the Court of Appeals, that Petitioner could not pursue a continuing violation claim, was proper.

Consistent with the holdings of the United States Court of Appeals for the Third Circuit in *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476 (3d Cir. 1997), and *West v. Philadelphia Electric Co.*, 45 F.3d 744 (3d Cir. 1995), New Jersey courts have determined that equitable tolling of the statute of limitations under the continuing violation theory is *not* available for discrimination claims arising from discrete acts. *See Bolinger v. Bell Atlantic*, 330 N.J. Super. 300, 308-9, 749 A.2d 857, 861-62 (App. Div. 2000); *Hall v.*

St. Joseph's Hosp., 343 N.J. Super. 88, 104-5, 777 A.2d 1002, 1011-12 (App. Div. 2001). In doing so, New Jersey courts have adopted the analysis enunciated by the Fifth Circuit Court of Appeals in *Berry v. Board of Supervisors of Louisiana State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983), and utilized by the court in *Rush*, requiring a determination of whether the alleged conduct consists of the same type of discrimination so as to connect separate events, whether the complained of acts occur with frequency or in isolation, and whether there is a degree of permanence so as to distinguish discrete acts from continuing conduct. *Hall*, 343 N.J. Super. at 102, 777 A.2d at 1010 (citation omitted); *see also Bolinger*, 330 N.J. Super. at 307, 749 A.2d at 861.

The continuing violation theory does not apply to discrete employment actions like promotions. In *Bolinger*, for example, the New Jersey Appellate Division considered whether an employee's claim that his employer's decision to put him on half-pay disability status was subject to tolling under the continuing violation theory. The New Jersey state appellate court found that placement on half-pay disability status is a discrete event in the same manner as a termination or denial of promotion and specifically concluded that "plaintiff's removal from full-time status and placement on disability was a discrete, permanent event that placed him on notice that his rights were being violated and triggered his duty to take legal action to recoup those rights . . ." *Id.* at 309 (emphasis supplied) (citations omitted). *Id.* at 309, 749 A.2d at 862.

The courts below thus correctly viewed the denied promotions and transfer claims asserted by Petitioner as discrete events. Petitioner's cause of action with respect to each promotion or transfer accrued when she learned that she had not been offered the position or that it had been accepted by someone else. *See* Pet. App. 64a.

Finally, despite the fact that it is impermissible for a party to articulate a new theory for the first time on appeal, *see Frank v. Colt Indus., Inc.*, 910 F.2d 90, 100 (3d Cir. 1990), Petitioner attempted to re-plead and ultimately re-fashion her entire case by raising a hostile work environment claim for the first time in her opening Brief to the Court of Appeals. Specifically, she asserted that the continuing violation theory should apply to her "hostile work environment" claim, a strategy apparently employed in an attempt to invoke the continuing violation doctrine. She had never pled and had never litigated her case on the basis of a hostile work environment claim. Petitioner's case has always been about a series of discrete employment actions in the form of denied promotions, a single transfer, and her termination. Indeed, there is not a *single* reference to a hostile work environment claim in her 92-page Complaint and she never raised the specter of or advanced an argument in favor of, such a claim in *any* of the pleadings or memoranda she filed with the District Court. As the Court of Appeals correctly noted, Petitioner waived a hostile work environment argument by her failure to present it in any of the proceedings prior to the Court of Appeals, and that, even if she were permitted to argue that claim, she had failed "to cite to evidence that would support it." Resp. App. 4a. She raises this same argument again before this Court. *See, e.g.*, Pet. 12. Petitioner's attempt to raise this new claim is impermissible and should not be considered by this Court.

Thus, the District Court properly concluded, on two occasions, that Petitioner's claims of failure to promote and transfer do not constitute a "continuous wrong." *See* Pet. App. 12a & 37a. The Court of Appeals properly affirmed, finding that "[b]ecause [Jackson's] claims arose from discrete employment actions, and because it is clear from Jackson's

complaint that she believed she was being discriminated against at the time of these actions, we find that the continuing violation theory does not apply here." *See* Pet. App. 64a. These fact-bound conclusions require no review by this Court.

3. The Undisputed Evidence Establishes that Petitioner's Pretext Evidence Is Inadequate to Survive Summary Judgment

The courts below properly granted Respondents' motion for summary judgment on all of Petitioner's claims of discrimination and retaliation, to the extent they survived the District Court's granting of Respondents' motion to dismiss. First, Petitioner is unable to cast doubt upon Chubb's articulated, non-discriminatory reasons for its employment decisions.[6] Second, she is unable to submit evidence from which a factfinder could infer that discrimination or retaliation was a motivating or determinative cause for Chubb's actions. Pet. App. 53a. Petitioner's purported evidence of pretext is, in every instance, unsupported by the record and irrelevant to her claims. Her poor performance, and not some grand scheme to discriminate against her, motivated the employment decisions about which she complains.

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6. Notably, the District Court also found that Jackson had failed to make out a *prima facie* case with respect to her failure to promote claims because she failed to establish that she applied for the positions in question. Pet. App. 46a. The District Court's decision was correct for the reasons set forth in the Court's opinion. *See* Pet. App. 48a. Nevertheless, the District Court evaluated the other elements of Petitioner's cause of action, and found it insufficient to survive summary judgment. Pet. App. 46a. The Third Circuit did not decide whether Jackson had made out a *prima facie* case, stating that even if she had she could not prove pretext. Pet. App. 64a.

Petitioner's discrimination claims are governed by the burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and later clarified and reaffirmed in *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Where an employee has established a *prima facie* case of discrimination, the employer must then articulate a legitimate, non-discriminatory reason for the employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Burdine*, 450 U.S. at 252-56; *Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 596, 538 A.2d 794, 805 (1988). Once the employer does so, the presumption of discrimination drops from the case. *Hicks*, 509 U.S. at 507. The District Court, as affirmed by the Court of Appeals, properly credited the explanations offered for Chubb's decisions to promote other employees over Petitioner and to terminate Petitioner's employment, thereby placing the burden on Petitioner to show pretext.

Petitioner was obligated to discredit Chubb's proffered reasons through the submission of some evidence "from which a factfinder could reasonably either: (1) disbelieve [Chubb's] articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of [Chubb's] action." *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). As the District Court noted, her burden in designating "specific facts showing that there is a genuine issue for trial," required Petitioner to do more than simply "replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Pet. App. 40a.

It is not enough for Petitioner to show that Chubb's decisions were incorrect or unfair. *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 543 (3d Cir. 1992) ("Title VII . . . does not require employers to treat all employees fairly, closely monitor their progress and insure them every opportunity for advancement"). Where, as here, poor performance is offered as the reason for the employment action, pretext is not established by virtue of "the fact that [the employee] has received some favorable comments in some categories or has, in the past, received some good evaluations." *Id.* at 528. Petitioner had to show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Chubb's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' and hence infer 'that [Chubb] did not act for [the asserted] non-discriminatory reasons.'" *Fuentes*, 32 F.3d at 765 (citing *Ezold*, 983 F.2d at 527). The lower courts properly found that Petitioner could not do so.

Initially, Petitioner incorrectly asserts that mere disagreement over her performance, and alleged discrepancies between the testimony of Chubb witnesses and the documents, is sufficient to preclude summary judgment. Pet. 22-24. The remainder of her argument is aimed at attempting to demonstrate pretext by offering unsupported allegations in the following broad categories: (1) other employees suffered from similar performance deficiencies but were treated more favorably, Pet. 26-27; (2) Chubb's criteria for evaluating the performance of Examiners like Petitioner was subjective, Pet. 25; (3) a former supervisor told racial jokes and discriminated against other minority employees, Pet. 28-29; and (4) Chubb did not investigate

her complaints of discrimination, Pet. 29-30. As the courts below properly determined, these unsupported allegations are not adequate to substantiate Petitioner's pretext burden.

Noting that Petitioner's argument was in many regards "wholly unsupported by the evidence of record," the District Court concluded, "the plaintiff has failed to come forward with evidence that the defendants' proffered non-discriminatory reasons for their actions were a mere pretext for discrimination." Pet. App. 49a, 52a-54a. The Court of Appeals properly affirmed the District Court, concluding that Petitioner's "claims are wholly unavailing." *See* Pet. App. 63a. These conclusions do not require yet another level of review by this Court.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 7, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2133

MARIE N. JACKSON,

Appellant

v.

CHUBB CORPORATION; CHUBB & SON, INC.; FEDERAL INSURANCE COMPANY; PAT HURLEY; MICHAEL MARINARO; GEORGE FAY; DORIS JOHNSON; MALCOLM BURTON; JEFF KING; KIM HOGREFE; BRIAN KIRSTIANSEN; SUSAN GAFFNEY; ED ELLIS; JIM GARDNER; JOHN DEGNAN; ED SPELL; SYLVESTER GREEN; RON GOLDSTEIN; AARON GOLDSTEIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civil No. 98-cv-04361
District Judge: The Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit LAR 34.1(a)
June 5, 2002

Before: SCIRICA, BARRY, and WEIS, *Circuit Judges*

(Opinion Filed: June 7, 2002)

Appendix

OPINION OF THE COURT

BARRY, *Circuit Judge*

On September 15, 1998, Marie Jackson filed suit against Chubb Corporation, Chubb & Son, Inc., a division of Federal Insurance Company, and 16 individual employees, alleging race, gender, and age discrimination in the workplace.[1] After a series of motions and rulings thereon by the District Court, the defendants ultimately prevailed. Jackson appeals, challenging: (1) an order filed on August 16, 1999 that dismissed the Chubb Corporation as a named defendant; (2) the portion of an order filed on September 5, 2000 that dismissed Jackson's NJLAD claims on statute of limitations grounds; (3) an order filed on December 5, 2000 that affirmed the order of the Magistrate Judge denying Jackson's motions for additional discovery; and (4) the portion of an order filed

1. Jackson brought suit under myriad provisions of federal, New Jersey, and New York law, including: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"); the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"); the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"); the Employee Retirement Income Security Act, 29 U.S.C. § 10001, *et seq.* ("ERISA"); the Thirteenth and Fourteenth Amendments of the United States Constitution; the New York Human Rights Law, N.Y. Exec. Law § 290, *et seq.* (McKinney 2000) ("NYHRL"); and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* ("NJLAD"). Jackson also asserted claims for wrongful discharge, breach of contract, promissory estoppel, fraudulent misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, negligent supervision, violation of the doctrine of respondeat superior, acts of conspiracy, and breach of contract.

on March 21, 2001 that, following the Court's lengthy and altogether thorough opinion, granted summary judgment in favor of the defendants on her remaining NJLAD claims.[2] After careful consideration, we conclude that Jackson's claims are wholly unavailing and we will affirm the District Court. We have jurisdiction to hear this appeal under 28 U.S.C. § 1291. Because the parties are familiar with the facts, we need not recite them here.

Jackson first argues that the District Court erroneously dismissed, pursuant to Fed. R. Civ. P. 12(b)(6), all but a few of her NJLAD claims on statute of limitation grounds.[3] She asserts that a six-year and not a two-year statute of limitations applies to all of the dismissed claims. The Supreme Court of New Jersey has clearly held, however, that a two-year statute of limitations applies to all claims under the NJLAD in which the "operative facts" arose after July 27, 1993. *Montells v. Haynes*, 133 N.J. 282, 298 (1993). We agree with the District Court that all of the "operative facts arose in and after 1994 and, therefore, the two-year

2. Jackson does not challenge numerous other decisions of the District Court — many of which were part of the orders she challenges. All grounds of appeal related to those unchallenged decisions — whether within or without the challenged orders — are waived on appeal. *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993); *see also Kirschbaum v. WRGSB Assoc.*, 243 F.3d 145, 151 n.1 (3d Cir. 2001); *F.D.I.C. v. Deglau*, 207 F.3d 153, 169 (3d Cir. 2000).

3. "We exercise plenary review over the District Court's dismissal under Fed. R. Civ. P. 12(b)(6)." *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 796 (3d Cir. 2001).

statute of limitations applies" to Jackson's dismissed claims.[4] App. at 48. In the alternative, Jackson argues that the statute of limitations should have been tolled because "no single specific event in [a] continuous pattern of violations placed [her] on notice." Appellant's Br. at 22. Because Jackson's claims arose from discrete employment actions, and because it is clear from Jackson's complaint that she believed that she was being discriminated against at the time of these actions, we find that the continuing violation theory does not apply here.[5] *Bolinger v. Bell Atlantic*, 330 N.J. Super. 300, 308-09 (App. Div. 2000); accord *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483 (3d Cir. 1997); *Bullington v. United States Airlines, Inc.*, 186 F.3d 1301, 1311 (10th Cir. 1999).

Jackson next argues that the District Court erred in granting summary judgment for the defendants on her remaining NJLAD claims.[6] The burden-shifting framework

4. Consequently, *Ali v. Rutgers* does not change the result here. 166 N.J. 280, 287 (2000) (holding that a six-year statute of limitations applies in cases where the operative facts arose both *before* and after July 27, 1993).

5. Jackson makes a "hostile work environment" claim for the first time on appeal. Because she failed to raise this claim below, however, it is waived on appeal. Even if the claim were not waived, Jackson fails to cite to evidence that would support it.

6. "This Court's review of the District Court's grant of summary judgment is plenary, and the record is judged by the same standard district courts use." *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000). It is well-settled that we must view the evidence in the light most favorable to the non-moving party. *Hancock Industries v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987).

adopted for Title VII cases as originally set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), is the same framework utilized in NJLAD cases. *Peper v. Princeton Univ. Bd. Of Trustees*, 77 N.J. 55, 82 (1981). Where an employee has established a prima facie case of discrimination, the employer must articulate a legitimate, non-discriminatory reason for the employment action, after which the burden shifts back to the employee to show pretext. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993); *Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 596 (1988). Assuming, without deciding, that Jackson established a prima facie case, and that the defendants articulated non-discriminatory reasons for their actions, we find that Jackson failed to show pretext and, accordingly, her claim fails.

Jackson also argues that the District Court erred when it affirmed the Magistrate Judge's denial of her motions seeking additional discovery.[7] Jackson failed, however, to appeal the order of the Magistrate Judge in a timely manner. Federal Rule of Civil Procedure Rule 72(a) states, in relevant part, that "[w]ithin 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order." Jackson filed an objection seven days after the deadline and never moved for an extension pursuant to

7. "We review the District Court's order affirming the magistrate judge's decision denying discovery . . . under an abuse of discretion standard." *Angelino v. New York Times Co.*, 200 F.3d 73, 88 (3d Cir. 1999). The District Court may reverse a magistrate judge's ruling regarding a non-dispositive issue such as discovery only if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

Federal Rule of Civil Procedure 6. Consequently, she waived her right to claim error as to this issue.[8]

Finally, Jackson argues that the District Court erred when it dismissed the Chubb Corporation as a defendant. The District Court found that the Chubb Corporation was not a proper party to the suit because it was a separate and distinct entity from its subsidiary, Chubb & Son, Inc., which was Jackson's actual employer. The Court also found that there were no grounds for allowing Jackson to pierce the corporate veil as to the Chubb Corporation. Because we have found that the subsidiary, Chubb & Son, Inc., is not liable, it follows that its parent company, Chubb Corporation, cannot be held liable. Thus, this claim is moot.

We will affirm the orders of the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Maryanne Trump Barry
Circuit Judge

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8. In any event, we do not find that the District Court abused its discretion when it found that the orders of the Magistrate Judge denying additional discovery were not clearly erroneous or contrary to law.